STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 16, 2003
v	No. 238131 Wayne Circuit Court
RICKY G. DUNCAN, Defendant-Appellant.	LC No. 00-005039-01

Before: Whitbeck, C.J., and Gage and Zahra, JJ.

PER CURIAM.

Following a bench trial, the trial court convicted defendant Ricky Duncan of three counts of third-degree criminal sexual conduct (CSC).[1] The trial court sentenced Duncan to concurrent prison terms of 3 to 15 years' imprisonment for each conviction. Duncan appeals as of right. We affirm.

I. Basic Facts And Procedural History

A. Overview

Duncan was accused of sexually assaulting a mentally disabled adult neighbor. The complaining witness testified that Duncan engaged in non-consensual anal sex at least ten times. A physically handicapped teen testified that Duncan supplied the complaining witness with cigars and pornography and told him on numerous occasions that if he were a girl "that he'd have sex with him." Another neighbor testified that he saw the complaining witness, without pants, in Duncan's trailer.

B. Unpreserved Claims And Effective Assistance Of Counsel

Duncan's first four issues on appeal are related. In his first issue, he argues that the trial court erred by not examining the complaining witness to determine whether that mentally disabled adult understood the meaning of the oath to give truthful testimony. In his second issue, Duncan argues that the court erred by allowing "bad acts" evidence, contrary to MRE 404(b).

[1] MCL 750.520d(1)(b) (force or coercion).

Duncan failed to object during trial to the first two matters raised on appeal, leading to his third issue, in which he claims that his trial attorney's failure to preserve those issues deprived him of the effective assistance of counsel. The trial court held a *Ginther*[2] hearing, but Duncan argues in his fourth issue that the trial court improperly terminated that hearing before he had an opportunity to present all his proofs. Below, we consider these four issues collectively.

The complaining witness was a twenty-one-year-old adult male with the mental capacity of a six- or seven-year-old child, according to his mother. The court clerk administered the oath or affirmation, but the trial court did not conduct an inquiry into whether the witness understood the meaning of his oath or affirmation. Duncan did not object at trial and did not separately examine the witness about his ability to understand the oath.

Following his conviction, Duncan moved for a new trial, arguing that the trial court erred by failing to sua sponte inquire into the complaining witness' capacity to understand the oath or affirmation. The trial court ruled that it had taken into consideration the witness' mental abilities while the testimony was ongoing:

> This person, the Court found, did know the difference between right and wrong. And that he did give a detailed explanation of what happened to him.
>
> And not only that, his testimony was corroborated by other witnesses. And based on his testimony the Court found that he had not made up, he had repeated what he said to other people.
>
> That the other witnesses, the witnesses who testified, testified to certain details which certainly was almost identical to what the witness said.
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> So, just because he was not a bright person doesn't mean that he didn't know the difference between telling the truth.
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> And naturally all of that is weighed in the fact finding, as to whether or not he was making it up, whether he was dreaming, or whether he was telling the truth. All that was considered.
>
> And after making – taking into consideration all of the circumstances, the Court found that he was a competent witness. He was a truthful witness.
>
> That his testimony was corroborated by the testimony of other witnesses who testified in the case. And made a finding, beyond a reasonable doubt, that he was telling the truth. And he was a competent witness.

The trial court therefore denied Duncan's motion for a new trial.

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

During the trial, a neighbor testified on behalf of the prosecution about the relationship between Duncan and handicapped persons. During that testimony, the witness referred to Duncan as "perverted" and stated that Duncan had once made sexual comments to the witness' wife. Duncan failed to object to either reference.

After trial, Duncan moved for a new trial and the trial court conducted a *Ginther* hearing as part of the motion hearing. The sole witness at the hearing was Duncan's trial counsel. Duncan's new attorney examined trial counsel about the proofs offered at trial. The trial court expressed apparent frustration with the pace of the questions, most of which dealt with matters already discernable from the record. The trial court interrupted several times to ask counsel to move the proceedings along and to "get to the point." Finally, the trial court ruled that Duncan had not been deprived of the effective assistance of counsel:

> All right. The Court rules that there was no ineffective assistance of counsel. That the attorney in this case acted in a Constitutional manner. That all the defenses that were to be presented in this case were in fact presented. That there was not ineffective assistance of counsel.
>
> And the Court is going to deny the Motion for Retrial [*sic*].
>
> The matter then may go to the Court of Appeals for their opinion. This matter is closed.

Defense counsel stated, "[v]ery well," and did not object that his questioning was incomplete. Later, however, he filed an affidavit alleging that he had not completed his inquiry when the trial court terminated the hearing. Counsel attached to his affidavit a list of the questions that he had planned to ask and the answers that he anticipated receiving.

C. New Evidence; Insufficient Evidence

In his fifth issue, Duncan argues that the trial court erred by denying his motion for a new trial on the basis of newly discovered evidence. After this appeal was filed, Duncan filed a motion to remand to allow him to move for a new trial on the basis of newly discovered evidence.[3] Duncan argued that the complaining witness told a nearby neighbor "some time after March 2000" that there was no sexual act between him and the complainant. This Court denied the motion. In his final issue, Duncan argues that there was not sufficient evidence of his guilt.

II. Unpreserved Claims And Effective Assistance Of Counsel

A. Standard Of Review

Duncan argues that the trial court had a duty to sua sponte inquire into the complaining witness' competency before permitting him to testify. To preserve an issue of competency under these circumstances, an aggrieved party is required to make a timely objection rather than rely on

[3] See MCR 2.611(A)(1)(f).

a court's independent obligation.[4] Similarly, the trial court does not have a sua sponte duty to disallow "bad acts" testimony.[5] To preserve this issue, an aggrieved party must likewise raise a timely objection.[6] Because Duncan did not preserve these issues with an appropriate objection at trial, appellate relief is precluded absent a plain error affecting his substantial rights.[7]

Whether a defendant was denied effective assistance of counsel presents a mixed question of fact and constitutional law.[8] This determination requires a judge first to find the facts, then determine "whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel."[9] We review the trial court's factual findings for clear error and review de novo its constitutional determination.[10]

B. The Legal Presumption Of Competence

The law presumes that witnesses are competent to testify:

> Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in these rules.[11]

But under former MCL 600.2163, a court was required to take special precautions with youthful witnesses:

> Whenever a child under the age of 10 years is produced as a witness, the court shall by an examination made by itself publicly, or separate and apart, ascertain to its own satisfaction whether such child has sufficient intelligence and sense of obligation to tell the truth to be safely admitted to testify; and in such case such testimony may be given on a promise to tell the truth instead of upon oath or statutory affirmation, and shall be given such credit as to the court or jury, if there be a jury, it may appear to deserve.

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[4] An oath or affirmation is required under MRE 603. See also *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[5] See MRE 103(a)(1); MRE 404(b)(1); *People v Miller*, 186 Mich App 660; 465 NW2d 47 (1991) (abuse of discretion standard applies to admission of "bad acts" evidence).

[6] *Carines, supra*.

[7] *Id.* at 763-764.

[8] *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002).

[9] *Id*. at 579.

[10] *Id*.

[11] MRE 601.

This statute was repealed by 1998 PA 323 and, therefore, is not applicable to this case. Further, the statute addressed only the bright-line chronological age of a witness (age ten), not the murkier assessment of emotional or mental maturity. Thus, it does not support Duncan's argument that the trial court erred by failing to sua sponte determine the competency of the adult witness.

C. Inconsistencies

Duncan additionally argues that a new trial is required because inconsistencies in the complainant's testimony demonstrated that he did not possess sufficient intellect or a sufficient sense of his obligation to tell the truth. We disagree. While the complainant testified with child-like simplicity, mere inconsistencies in his testimony, and impeachment testimony that the complainant had admitted fabricating the allegations, do not necessarily establish that the complainant was not competent to testify. Further, given that other witnesses may have been able to testify about the offenses under applicable exceptions to the hearsay rule, even if the complainant was disqualified,[12] we do not dismiss the possibility that the complainant's competency to testify deliberately was not challenged by the defense for strategic reasons. This enabled the defense to bring out the alleged inconsistencies and to highlight the complainant's limitations before the factfinder in an attempt to undermine the reliability and credibility of the allegations. For these reasons, we conclude that Duncan has not established a plain error affecting his substantial rights.

D. Ineffective Assistance Of Counsel

Duncan argues that his trial attorney's failure to raise the necessary objections deprived him of the effective assistance of counsel. To establish ineffective assistance of counsel, defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and that, but for counsel's error, it is reasonably probable that the outcome would have been different.[13] Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise.[14] To show an objectively unreasonable performance, defendant must prove that counsel made "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment."[15] In so doing, defendant must overcome a strong presumption that the challenged

[12] See MRE 803(2) (excited utterance), MRE 803(4) (statements made for medical treatment), and MRE 803(24) (other exceptions).

[13] *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 314, 318; 521 NW2d 797 (1994).

[14] *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994).

[15] *LeBlanc*, *supra* at 578, quoting *Strickland*, *supra* at 687.

conduct might be considered sound trial strategy.[16] Defendant must also show that the proceedings were "fundamentally unfair or unreliable."[17]

Here, Duncan has not shown that trial counsel's performance was so deficient that it denied him the effective assistance of counsel. The questions that Duncan's new counsel asked at the *Ginther* hearing and the questions that he claims would have been asked if the trial court had not terminated the hearing demonstrate an effort to inquire into what was already apparent from the existing record. For example, the main thrust of the questioning addressed whether trial counsel asked certain questions during the testimony, matters which can be ascertained by reviewing the trial transcript itself. Absent from both the *Ginther* hearing and the proposed supplemental questions and answers is any alleged explanation for *why* trial counsel did not object to the matters now asserted on appeal.

Trial counsel's decisions concerning what witnesses to call or questions to ask are presumed to be matters of trial strategy.[18] Duncan has not overcome the presumption that trial counsel purposefully refrained from challenging the competency of the complaining witness as a matter of strategy, because a successful objection might allow the evidence to come in through other, more polished, witnesses, without the opportunity to display for the finder-of-fact the inconsistencies, uncertainties, or exaggerations the mentally impaired witness might bring to the stand. Duncan similarly has failed to overcome the presumption that trial counsel may have refrained from objecting to testimony about his relationship with an adult married woman in an effort to cast doubt upon the same-sex conduct charged in this case. The questions posed at the *Ginther* hearing, and the supplemental questions and answers offered in the attorney's affidavit, do not overcome the presumption that counsel's actions constituted sound trial strategy.

III. Newly Discovered Evidence

A. Standard Of Review

To warrant a new trial on the basis of newly discovered evidence, a defendant must show that: (1) the evidence itself, and not merely its materiality, is newly discovered; (2) the evidence is not merely cumulative; (3) the evidence is such as to render a different result probable on retrial; and (4) the defendant could not with reasonable diligence have produced it at trial.[19]

B. The New Evidence

Duncan argues that a new trial is warranted on the basis of the affidavit of Baheseg Hindy, who lived in the complainant's neighborhood. The affidavit indicated that the complainant told Hindy that Duncan had done nothing to him and had laughed while telling Hindy that he had "really fixed [Duncan] good." However, the purpose of this evidence would

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[16] *People v Knapp*, 244 Mich App 361, 385-386; 624 NW2d 227 (2001).

[17] *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2002).

[18] *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

[19] *People v Lester*, 232 Mich App 262; 591 NW2d 267 (1998).

be to impeach the complainant's testimony, and newly discovered evidence is not a basis for a new trial if it would only be used to impeach.[20] Moreover, we conclude that this testimony is cumulative of trial testimony of Russell Powers, another neighbor and father of the complainant's friend, that the complainant had told him and several other people that the incident never occurred, and that he had made the accusation only for attention. Therefore, Hindy's affidavit does not warrant a new trial.

IV. Sufficiency of the Evidence

A. Standard Of Review

Duncan argues that there was insufficient evidence of penetration to sustain the verdicts. We review de novo challenges to the sufficiency of the evidence, taking the evidence in the light most favorable to the prosecutor and determining whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt.[21]

B. The Evidence Of Penetration

The complainant testified that Duncan put his penis "[i]n my butt . . . where the poop comes out," and said that it hurt. The complainant's testimony alone, even if uncorroborated, is sufficient evidence to establish defendant's guilt of CSC beyond a reasonable doubt.[22] Whether the complainant's testimony was credible was a matter for the factfinder, not this Court, to determine.[23] Viewed in a light most favorable to the prosecution, the testimony was sufficient to enable a rational trier of fact to find that the element of penetration was proven beyond a reasonable doubt.[24]

Affirmed.

/s/ William C. Whitbeck
/s/ Hilda R. Gage
/s/ Brian K. Zahra

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[20] *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993).

[21] *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Herndon*, 246 Mich App 371, 415; 633 NW2d 376 (2001).

[22] See MCL 750.520h; *People v Lemmon*, 456 Mich 625, 642 n 22; 576 NW2d 129 (1998).

[23] *Lemmon*, *supra* at 646-647; *People v Avant*, 235 Mich App 499, 506; 597 NW2d 864 (1999).

[24] *People v Petrella*, 424 Mich 221, 268-270; 380 NW2d 11 (1985).